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THE COMMLAW GROUP

May 20, 2013

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: WC Docket No. 06-122 - REQUEST FOR GUIDANCE

Dear Ms. Dortch:

The Ad Hoc Coalition of International Telecommunications Companies ("Coalition") (www.telecomcoalition.com) submits this request on behalf of its members, all of whom operate in the international sector of the telecommunications industry. The Coalition hereby requests that the Federal Communications Commission ("FCC" or "Commission") provide guidance on the following issues related to FCC Form 499 ("Form 499") revenue reporting and which materially impact the Universal Service Fund ("USF") contribution obligations of international service providers.

Due to the Universal Service Administrative Company's ("USAC") unfavorable policies, no single member of the Coalition has been willing to present any of the requests for guidance set forth herein directly to USAC. USAC's policies vis-à-vis such requests for guidance have created a palpable aura of fear among well-intentioned service providers, who are merely seeking clarification of unclear Form 499 Instructions and underlying FCC rules; fear that, in coming forward and expressing their confusion, they may be singled out for recrimination or otherwise subjected to undue penalties simply for being bold enough to seek USAC guidance. Until well-intentioned service providers can obtain guidance either from USAC or the FCC without these very real and legitimate fears, the FCC should entertain and promptly respond to anonymous requests for guidance, such as the Coalition's instant submission.

Under its current policies, USAC requires disclosure of a specific Filer Name and the assigned Filer ID for all requests for guidance related to Form 499 reporting, even requests seeking clarification of unclear, ambiguous or contradictory language in the Form 499 Instructions. As a result, Filers cannot present "hypothetical" questions to USAC, or seek guidance on reporting obligations anonymously. In recent times, several Filers have come forward seeking guidance from USAC to confirm their qualification for exemption from USF fees per FCC rules. In response to these well-intentioned Filers, USAC disagreed with their analysis of the Instructions and underlying FCC rules and instructed them to contribute to the USF not only for current and prospective periods, *but also* all prior periods of operations, going as far back as 1998 in some cases (since USAC does not currently recognize any limitations period on its ability to require Filers to remit Forms 499 and issue back-billings for USF contributions arising there from). To avoid the unfortunate fate that has befallen Filers that have candidly and openly sought USAC's guidance, the Coalition's members have

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elected to by-pass USAC and anonymously pursue their request directly with the Commission through the Coalition.

At the outset, the Coalition must first clarify that it disputes USAC's authority to provide "guidance" on many substantive issues, particularly any issue that requires an interpretation of FCC rules or judicial precedent. As pointed out many times and in many different ways by dozens of parties over the years, USAC simply lacks the legal authority to *interpret* FCC rules.[1] Yet, despite this clear and unambiguous limitation on USAC's legal authority, the FCC has neither acted to enforce the limitation nor has USAC allowed the limitation to stop it from instructing Filers such as Five9 and MeetingOne to reclassify revenues and contribute to the USF following USAC's *interpretation* of substantive FCC rules and applicable judicial precedents.[2] The Coalition submits that these actions equate to rule interpretations in violation of USAC's limited authority. For these and the other reasons described above, the Coalition respectfully presents this request directly to the Commission for its prompt consideration.

The requests herein relate specifically to the contribution obligations of international service providers. The confusion primarily stems from unclear language in the Form 499-A instructions ("Instructions") and a divergence between the Instructions and the FCC's applicable rules, policies and judicial precedent. Without clarification, international service providers cannot be certain of their reporting obligations nor can they accurately and confidently determine their exposure to USF contributions, direct or indirect (through suppliers and carrier partners). As a result, with respect to international service providers, the Fund does not meet the predictability and non-discrimination requirements of the Communications Act.[3] For these reasons, the Coalition respectfully requests that the Commission provide timely guidance on the following issues.

1. Contributions on U.S. Transit Traffic

The FCC's rules provide that revenues from telecommunications traffic that both originates and terminates in foreign points, and which merely transits a switch located in the United States, are excluded from a Filer's USF contribution base.[4] Long-standing Commission precedent

[1] USAC may not "make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress" and is required to seek guidance from the FCC on such matters. 47 C.F.R. § 54.702.

[2] Request for Review of a Decision by the Universal Service Administrator and Emergency Request for Stay by Five9, Inc., WC Docket 06-122 (filed Feb. 22, 2013); *See, e.g.*, MeetingOne.com Corp, Notice of Ex Parte Presentation, Application for Review by MeetingOne.com Corp. of Wireline Competition Bureau Order, WC Docket No. 06-122 (filed March 5, 2012).

[3] Section 254(d) of the Communications Act of 1934, as amended, requires that "every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service." 47 U.S.C. § 254(d).

[4] *See, e.g., Universal Service Monitoring Report,* CC Docket No. 98-202 (Oct. 2011) ("…revenue[s] from 'international-to-international' telephone calls, which are defined as U.S. telecom calls that traverse U.S. territory but both originate and terminate in foreign points…are exempt from universal service contribution."); *See also* Instructions to 2013 Telecommunications Reporting Worksheet,

unambiguously says that the jurisdiction of international transit traffic is determined by the ultimate end points of the end-to-end transmission.[5] There is nothing in the FCC's rules or jurisprudence that would suggest providers of intermediate cross-connection circuits should treat purchasers of said circuits as "end users" for USF pass-through assessment purposes, when the U.S. cross-connects are solely being utilized to switch foreign-originated traffic from one physical network provider to another physical network provider, and where the foreign-originated traffic does not terminate to the U.S. PSTN, but instead transits the U.S. on its way to a foreign termination.

Despite the FCC's clear intention to ensure that foreign-originated, foreign-terminated U.S. transit traffic be exempt from USF fees, Coalition members and supporters have reported examples of certain U.S. carriers who are assessing USF surcharges on cross-connects and other circuitry that is used to facilitate transit traffic, even when there is clear and convincing evidence that the traffic is BOTH foreign-originated and foreign-terminated and merely traversing a switch in the U.S. It has been reported that certain U.S. carriers are claiming adherence to the Form 499-A Instructions as supporting their treatment of revenues from such circuits as USF contribution eligible, thereby justifying their imposition of pass-through surcharges. As a result, even if the international carrier customer of the U.S. cross connect provider uses circuits exclusively to transport traffic between foreign points, these wholesalers treat the traffic as being either U.S.-originated or U.S.-terminated, thus subject to potential USF pass-throughs. Because an international only reseller does not contribute directly to the USF, per the Instructions, the wholesale carrier must treat revenues from this reseller as end-user revenues, and include them in the wholesaler's USF assessable base. Accordingly, the wholesaler then passes through USF liability incurred as a result of this treatment to its international reseller customer.

Pursuant to the Coalition's review, neither the Instructions nor FCC rules appear to mandate this treatment of revenue derived from cross connect/intermediate transit circuits associated with foreign-to-foreign transit traffic. The FCC analyzes the jurisdiction of traffic based upon the ultimate end points of a transmission, as consumed by the end user. Thus, wholesalers that sell a portion of a route that ultimately delivers traffic from one end point abroad to another foreign end point should not be allowed, by the FCC, to treat revenues from the sale as U.S.-originated or terminated, even if this portion of the ultimate transmission may transit the United States. The FCC should act to clarify that U.S. carriers selling transit circuits to providers of wholly international services that merely

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Form 499-A ("Instructions") at 19 ("International calls that traverse the United States but both originate and terminate in foreign points are excluded from the universal service contribution base."); 47 C.F.R. § 54.706 ("[E]very entity required to contribute to the federal universal service support mechanisms under paragraph (a) of this section shall contribute on the basis of its projected collected interstate and international end-user telecommunications revenues."); 47 C.F.R. § 43.61 (defining "international telecommunications service" as "telecommunications service between the United States (as defined in the Communications Act, as amended, 47 U.S.C. 153) and any country or point outside that area)").

[5] *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000) ("[The FCC] has focused on 'the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.'") (quoting *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Intracarrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689, 3695, ¶ 10 (1999)).

transit a switch in the U.S. must exempt the transit carrier from USF pass-throughs. The effect of FCC inaction is the perpetuation of a discriminatory practice that harms any carrier that is not providing international U.S. transit traffic on an end-to-end, wholly-owned facilities basis, as described by the following examples:

1. Company A: End-to-end facilities based network provider (No USF fees)

- Company A owns a U.S. transit switch and pipes on either side (that deliver traffic to and from foreign points)
- For example, Company A owns facilities for a route from London to Tokyo with a switch in New York, traffic originates and terminates in London and merely transits the U.S. at the New York switch
- Company A has visibility into entire circuit and end points
- Company A does not rely upon a third party carrier to transport traffic for any portion of the London – Tokyo route
- Company A does not include revenues from traffic delivered via these circuits in its USF contribution base
- For example, if the cost of the circuit is $10,000, the total cost to Company A is $10,000

2. Company B: Non-facilities based reseller (USF fees owed)

- Company B does not own the transit switch and pipes on either side (that deliver traffic to and from foreign points), but only the pipe on one side
- Company B relies on a third party carrier to deliver traffic on a portion of the route it sells; it owns facilities for only a portion of the routes it covers
- For example, Company B sells service on the same route as Company A: from London to Tokyo, hitting a switch in New York
    - Company B owns the facilities for the route from London to the New York switch
    - Company B relies upon a third party carrier to deliver traffic from the New York switch to Tokyo
    - Company B's traffic still originates in London and terminates in Tokyo, merely traversing the U.S. via the New York switch
    - The third party carrier, however, may treat the circuit as delivering U.S. originated traffic since the third party carrier transmits traffic only on the New York – Tokyo leg of the call
    - As a result, the third party carrier may treat revenues from the New York – Tokyo leg as USF assessable end-user revenues, and include them in its USF contribution base
    - Accordingly, the third party carrier may pass USF fees along to Company B on these revenues
    - For example, if the New York – Tokyo leg costs Company B $5,000, its USF fees would be $775 (at the current rate of 15.5%)
    - Thus, Company B's costs have increased by 7.75%.

The Coalition respectfully requests confirmation from the Commission that the Instructions and FCC rules permit wholesale carriers to jurisdictionalize transit circuits based upon the ultimate

end points of the traffic delivered over the circuit. Because wholesalers have limited visibility into the ultimate use of the circuits they resell, a certification from a reseller customer confirming that the circuit is used exclusively to transmit traffic that both originates and terminates outside of the United States should suffice for purposes of confirming that the circuit is exempt, and the wholesaler should not include revenues from this sale in its USF contribution base, or assess pass-through USF fees on the sale.

A similar certification process is common place for USF assessments related to special access circuits carrying jurisdictionally mixed traffic. USAC, with FCC approval, permits carriers to obtain certifications from resellers that less than 10% of the traffic flowing over the circuit is interstate, thereby exempting the revenues from that circuit from the wholesaler's USF contribution base, and eliminating pass-through fees on these revenues.[6] This certification process has proved administratively feasible, and could therefore be replicated in the international transit circuit context.

2. Foreign-billed Revenues and Settlement-Like Payments

The 2013 Instructions provide as follows on Page 14 (emphasis added):

> Note on International Services. — For international services, gross billed revenues consist of gross revenues billed by U.S. telecommunications providers with no allowances for settlement or **settlement-like payments**. International settlement and **settlement-like receipts** for **foreign-billed** service should not be included in U.S. telecommunications revenues. Note that if the filer receives the foreign-bound traffic in the United States, then it is providing ordinary international service from the United States to a foreign point; receipts from the originating carrier should be reported as revenue on Line 414. Filers may report international revenues in section 43.61 reports that are net of credits at the time the credits are issued.

This Instruction is unclear for two reasons. First, it refers to "settlement-like" payments. While the FCC's rules address "settlement" payments, nowhere do they describe or define "settlement-like" payments.[7] The Coalition respectfully requests that the Commission clarify the intended purpose and meaning of this language. Specifically, what constitutes a "settlement-like" payment or "settlement-like" receipt? For example, are settlement-like payments limited to bilateral international service agreements? Must billing and settlement arrangements conform with International Telecommunication Regulations? Must rates for such services be cost oriented?

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[6] *In the Matter of Mts & Wats Mkt. Structure Amendment of Part 36 of the Comm'n's Rules & Establishment of A Joint Bd.*, 4 F.C.C.R. 1352 (1989) ("We believe that the benefits of this method [separations treatment for mixed use special access lines] can best be achieved through customer certification that each special access line carries more than a de minimis amount of interstate traffic."); *See also* USAC 2012 499-A Webinar, March 2012 at 36, available at http://www.usac.org/_res/documents/cont/training/2012/File-Form-499-A-March-2012.pdf.

[7] *See, e.g., In the Matter of International Settlements Policy Reform; International Settlement Rates*, First Report and Order, IB Docket Nos. 02-324 and 96-261, FCC 04-53 (March 30, 2004).

And, how should a Filer determine if a "settlement-like" payment or receipt is "international" – if the payment was received in a foreign country? Or, should the Filer look to the end points of the traffic for which the payment was made or received? The Coalition respectfully requests that the Commission identify the basis for this Instruction in the FCC rules, and provide guidance on its specific application to international service providers.

Second, this Instruction references "foreign-billed" services. It notes that revenues from such "foreign-billed" services should not be included in the USF contribution base. The Instruction does not provide clear guidance on the meaning of the term "foreign-billed." And, nowhere do the FCC's rules reference "foreign-billed" traffic. Is foreign-billed traffic a way of distinguishing foreign from "domestic end users"[8] as referenced in Commission rules? The Coalition is unclear as to what constitutes foreign-billed traffic that should be excluded. Does foreign-billed traffic include traffic between end points in the U.S but billed to a non-U.S. entity? Does it include traffic between end points in the U.S. but billed to a U.S. company at a foreign address? Does it include traffic between the U.S. and an international end-point billed to a non-U.S. entity? Does it include traffic between the U.S. and an international end-point billed to a U.S. company at a foreign address? Further, does the term include traffic between foreign end points, billed to a non-U.S. entity? Likewise, does it include traffic between foreign end points billed to a U.S. entity at a foreign address?

Third, the Instruction indicates that foreign-bound traffic "received" in the U.S. constitutes an ordinary U.S. assessable service. What qualifies as "receipt" in a foreign country? If traffic merely traverses the U.S. (hits a U.S. switch), is it "received" in the U.S.; or is it received where it terminates? Furthermore, is this Instruction specifically limited to settlement and "settlement-like" payments, or does this obligation apply to all international service providers?

3. Foreign Carrier Services

The 2013 Instructions provide as follows at page 21:

> Line 418 should include revenues from telecommunications provided in a foreign country where traffic does not transit the United States or where the provider is offering service as a foreign carrier, i.e., a carrier licensed in that country.

Once again, the Coalition requests clarification on the meaning of this Instruction. Specifically, how does a Filer determine whether services are provided "in a foreign country"? Is this limited to traffic that originates and terminates in a foreign country? Or does this include traffic with at least one end-point in the U.S. and billed outside of the U.S. or to a non-U.S. entity?

In addition, what does it mean to offer service as a "carrier licensed in that [foreign] country"? For example, consider the following scenario. Company A is a U.S. carrier with a U.S. presence. Company A is also authorized to provide service in France. Is Company A providing services as a "carrier licensed" in France? Would Company A's revenues from services provided in France be excluded from its USF contribution base? Which revenues would be excluded: only

[8] *See* 47 C.F.R. § 54.709.

revenues from traffic that originates and terminates in France or elsewhere; or would all revenues be excluded because Company A is operating as a foreign carrier when it provides service in France?

Also consider the following scenario with the same facts above, but Company A has a sales affiliate in France. The sales affiliate sells Company A's services in France. Company A is still licensed in the U.S. and authorized to provide services in France. Are revenues from Company A's sales affiliate excluded from the USF contribution base under this Instruction?

4. International Top-Up

International top-up services have become commonplace in the wireless marketplace, particularly with recent increases in prepaid services. International top-up enables a U.S. customer to purchase minutes from a U.S. carrier which are then applied to the account of a consumer that is located outside of the U.S. The U.S. carrier (Company A) typically acts as an intermediary, and takes a commission or fee for providing the top-up service, but relies upon the non-U.S. customer's carrier (Company B) to provide the purchased wireless services. As noted, the services are provided by a foreign carrier and delivered to a consumer located in a foreign country. Company B is a non-U.S. entity that does not provide any services in the U.S. or to U.S. customers. Company B does not engage directly with U.S. consumers. Company B merely receives an instruction from Company A to top-up (increase) a specific customer's account balance. Company B's interaction with the U.S. marketplace is limited to its payment of a commission to Company A for facilitating the top-up transaction. Company A essentially collects funds from its customer and transfers them (less a commission) to Company B. Company B then increases its customer's account balance accordingly.

To date, the FCC has not provided guidance regarding the appropriate Form 499 reporting and regulatory treatment of revenue derived from international top-up services. How should these revenues be reported? And, how will they be treated by USAC? In the above scenario, should Company A include the sales commission earned from selling Company B's services in Company A's USF contribution base? Or, as the Coalition believes, should such revenue be reported as non-telecom revenue by Company A, since it is revenue derived from sales of a third party carrier? If the latter, then what are the registration, reporting and contribution duties of Company B if the topped-up customer originates calls from a foreign country and terminates calls to the U.S.?

5. Contributions on Wholly International Traffic

On September 4, 2009, the Coalition filed a Petition for Declaratory Ruling seeking a declaration that (1) USAC lacks authority to assess USF fees on international only providers, and that any such assessment violates federal law; and (2) the FCC lacks jurisdiction to impose USF obligations on non-U.S. entities, and that any attempt to achieve this goal either directly or indirectly is *ultra vires*.[9] That Petition remains pending before the Commission. Therein, the Coalition

[9] *See* Ad Hoc Coalition of International Telecommunications Companies Petition For Declaratory Rulings That (1) The Universal Service Administrative Company Lacks Authority To Indirectly Assess Universal Service Fund Fees on International Only Providers and (2) the FCC Lacks Jurisdiction Over Certain Non-U.S. Entities International Providers, or In The Alternative, To Initiate A Rulemaking Proceeding To Examine These Issues, filed Sept. 4, 2012.

encouraged the Commission to clarify that indirect contributions currently imposed on international only service providers violate the Communications Act and Commission rules.[10]

Because the Instructions require wholesale providers to treat revenues from exempt entities (including international only service providers) as end-user revenues, international only carriers ultimately contribute to the USF by way of pass-through charges from their suppliers. This indirect contribution obligation violates the law because: (1) the FCC lacks jurisdiction over non-U.S. entities[11]; (2) FCC rules exempt international only carriers from contribution obligations; (3) imposing contribution obligations on international only carriers violates the precedent established by the Court of Appeals for the Fifth Circuit in *TOPUC*[12]; and (4) imposing indirect contribution obligations on international only service providers violates the equitable and non-discriminatory mandates of the Communications Act. The basis for and additional support for these positions is outlined in the Coalition's Second Petition for Declaratory Ruling, which the Coalition encourages the Commission to review and rule upon in concert with this request.

The Coalition appreciates this opportunity to submit the foregoing requests to the Commission for clarification, and respectfully asks that the FCC take these matters under advisement and provide the requested clarifications as soon as possible.

Respectfully submitted,

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[10] *Id.*
[11] The FCC's jurisdiction is limited to interstate and foreign communications which originate or terminate within the United States. 47 U.S.C. § 152.
[12] *Texas Office of the Public Utility Counsel v. FCC,* 183 F.3d 393 (5th Cir. 1999) ("TOPUC").